JD(NY)–15–11
Avon, CT
Southington, CT
Waterbury, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

and **Case No. 34-CA-12592**
34-CA-12728
NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION **34-CA-12847**

Thomas Quigley, Esq. and Catalina Arango, Esq., Counsel for the General Counsel
Edward F. O'Donnell Jr. Esq. and Michael J. Spagnallo, Esq., Counsel for the Employer
Timothy K. Talbot, Esq., Counsel for the Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Hartford, Connecticut on April 30 and 31, 2011.

The charge and amended charges in 34-CA-12592 were filed on February 9, March 18, March 25 and April 30, 2010. A Complaint on those charges was issued on May 28, 2010.

The charge and the first amended charge in 34-CA-12728 were filed on June 16 and August 24, 2010.

On August 30, 2010 the Regional Director issued a Consolidated Complaint in 34-CA-12592 and 34-CA-12728.

The charge in 34-CA-12847 was filed on November 23, 2010 and the Regional Director issued a Consolidated Complaint in relation to this and the previous charges on January 20, 2011.

The allegations set forth in the Consolidated Complaint are as follows:

1. That in December 2009, the Respondent, sometimes referred to as AMR, suspended Ray Caruso, and Kristina Oliveira because of their union and concerted activities and in order to discourage employees from engaging in such activities.

2. That on December 19, 2009, the Respondent unilaterally modified its criteria for approving time-off requests without affording the Union an opportunity to bargain.

3. That on May 12 and May 21, 2010, the Respondent solicited employees to decertify the Union.

4. That on or about November 17, 2010, Respondent unilaterally modified its "outside employment" policy without affording the Union an opportunity to bargain.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings of Fact

I. Jurisdiction

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background

The Respondent (AMR) is a nationwide provider of ambulance and medical transportation services. The present case involves the Waterbury Division which covers the towns of Avon and Southington in addition to the city of Waterbury. The General Manager of the Waterbury facility is Robert Retallick. The local Human Resources person is Tony Cardivellis and Mark Hughson is the lead supervisor. Other supervisors referred to in this case are Bryan Reynolds, Michael Popyk and Joe Spagna. There are about 160 employees working in the Waterbury division. David Banelli is the National Vice President for Labor Relations and he was involved in contract negotiations between the Respondent and the Union.

For a number of years since 1998, employees of the Waterbury Division had been represented by the Waterbury Emergency Services Union, also known as WESU. This was an independent union that eventually affiliated with the International Union of Police Association. The first collective bargaining agreement was effective from 1999 through October 2002. Thereafter, two successive contracts were executed, the last of which ran from October 31, 2006 to October 30, 2010.

I note here that Ray Caruso, one of the alleged discriminatees in the present case was an officer of WESU who thereafter became the chief shop steward of NEMSA after that labor organization replaced WESU in September 2009.

In 2007, the International Union of Police Association notified WESU that it no longer wished to represent employees in the private sector and WESU obtained the assistance of another union, the International Association of EMTs and Paramedics. When that arrangement terminated, WESU sought to affiliate with the National Emergency Medial Services Association which is called NEMSU. When the Employer refused to recognize the affiliation, NEMSU gathered authorization cards from bargaining unit employees and filed a petition with the NLRB on July 10, 2009.

Pursuant to the Regional Director's Decision and Direction of Election dated August 7, 2009, an election was held on September 4. NEMSU received 82 votes against 55 employees

who voted against union representation. WESU had requested that it not be on the ballot and it was not. As a consequence, NEMSA was certified on September 15, 2009 in the following unit:

> All full-time and regular part-time and per-diem paramedics, emergency medical technicians and chair car drivers employed by the Employer at its Waterbury, Southington and Avon, Connecticut facilities, but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

After the election was held, bargaining for a first contract commenced in December 2009. AMR's chief spokesman was David Banelli and the Union's chief spokesperson was Timothy Talbot. Each side had various other representatives who participated in their respective caucus. Somewhat unusual to my experience, the Employer demanded and the Union acceded to a process whereby the parties met in three day segments and did not meet face to face unless there were specific points that had to be clarified. Thus, when the parties met, each side, for the most part stayed in separate rooms and electronically transmitted proposals and counter-proposals to each other.

About two weeks before the start of this hearing, the parties reached a first contract that was ratified by the bargaining unit but which had not yet been executed by the Employer.

After the Election, NEMSA filed a number of unfair labor practice charges against the Employer. (From September 28, 2009 to December 21, 2010). A hearing on a Consolidated Complaint was held before Administrative Law Judge Mindy Landow on April 14 and 15, 2010 and she issued a Decision on November 9, 2010. That Decision was sustained by the Board on May 10, 2011 in 356 NLRB No. 155. In pertinent part, she concluded that the Respondent violated Section 8(a)(1) (3) and (5) by;

1. Threatening employees with the loss of annual pay increases because they engaged in union activities.

2. Engaging in surveillance of employees' union activities.

3. Prohibiting employees from possessing union materials on company time and property.

4. Prohibiting employees from using a bulletin board to post union-related items.

5. Prohibiting employees from wearing a union pin.

6. Discriminatorily refusing to allow an employee to attend a company meeting on paid time.

7. Unilaterally and without notice to or bargaining with the Union, failing to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments and recertification payments.

8. Unilaterally and without notice to or bargaining with the Union, failing to post the biannual shift bid for bargaining unit employees.

9. Unilaterally and without notice to or bargaining with the Union, failing to grant EMTs, paramedics and drivers a scheduled annual wage increase.

It is noted that as to Caruso, one of the protagonists in this case, the Judge found that the Respondent violated Section 8(a)(1) of the Act when its agent instructed Caruso to remove a NEMSA pin from his uniform.

III. Allegations concerning Ray Caruso and Kristina Oliveira

As noted above, Ray Caruso was an officer of WESU when that labor organization was the bargaining representative. During the period of time that NEMSA sought to organize the employees, Caruso was a proponent for that labor organization and as previously noted was directed by AMR not to wear a NEMSA pin on his uniform. After NEMSA was certified, Caruso was on the new Union's bargaining committee and was elected as its chief shop steward. In that capacity, according to the testimony of Robert Retallick, he filed numerous grievances.

Kristina Oliveira is also employed by the Respondent and was, at the time of these events, a full-time employee. She was and is Caruso's finance and had little or no involvement in union affairs. [1]

All parties agree that at the time of these incidents and notwithstanding the lack of a contract between the Company and NEMSA, the Company and that Union were operating under certain terms and conditions as they existed under the previous collective bargaining agreement with the predecessor union. Insofar as relevant, the contract provisions are:

> Article X: Absence From Work
>
> Section 1. …. Paid personal days shall be available for sick days, paternity days, birthdays or whatever reason the employee shall deem appropriate. To be entitled to paid personal days, an employee must have notified the on duty supervisor of the proposed absence at least 6 hours before the start of his or her shift. Employees who do not give the on duty supervisor 6 hours notice of the proposed absence will not be paid for the day they are absent.
>
> Section 1A. Personal Day Limitations
>
> Notwithstanding any other language of this Agreement, there shall normally be a limit on the number of employees who will be compensated for personal days on any one particular shift, as follows: Ambulance Division – four employees, days; three employees, evenings: and two employees, nights.
> Transportation Services Division – four employees, days; three employees, evenings; nights not applicable.
> However, the Employer shall have reserved to it the right to increase or limit the number of employees who may be paid for personal days on any particular shift, as the Employer in its discretion determines it necessary to appropriately staff the shifts.

[1] At the time of this hearing, she had completed nursing school and was employed elsewhere on a full-time basis. She has not worked for the Respondent for quite some time although she could ask to work for the Respondent if she desired.

> Section 5. Unexcused Absences. Unexcused absence is defined as any absence from work without the approval of the Operations Director or his designee. Unexcused absences are a violation of the employee's responsibilities to the Employer and will subject the employee to discipline. Disciplinary penalty for unexcused absences shall consist of the following:
> Employee's first offense – one day suspension; employee's second offense – two day suspension; additional offenses subject the employee to termination. The Employer agrees to discuss the absence with the employee prior to taking disciplinary action.
>
> Article XII. Vacations.
> Section 2. Full time employees shall have an opportunity to request vacation time in multiple day increments provided such requests are received a minimum of thirty days in advance of the scheduled requested day off. Full-Time employees shall have an opportunity to request vacation time in single day increments provided such requests are received a minimum of two weeks in advance of the scheduled requested day off. Vacation time will be approved on a first come first served basis.

In December 2009, Caruso and Oliveira both worked on the 6 a.m. to 6 p.m. shift on Saturdays and Sundays.

(a) The denial of personal time offs for December 20 and the ensuing suspensions of Caruso and Oliveira

The General Counsel's contention is that AMR retaliated against Caruso because of his activities on behalf of the Union. As to Oliveira, the General Counsel argues that the Company's motivation in suspending her was not because of any union or concerted activity on her part, but in order to retaliate against Caruso, inasmuch as she is his finance. If this is true, then I would conclude that the Company's actions against Oliveira would be unlawful even though she did not engage in any union activity. Thus, any violation with respect to Oliveira would depend on a finding that the suspension of Caruso was discriminatorily motivated.

The Company's argument is that its actions against both employees were dictated by the terms of the applied collective bargaining agreement. That is, it asserts that both employees ignored contractually permissible company decisions to deny their requests for paid time off and therefore they were absent without excuse. The Company contends that it simply applied the contractually prescribed disciplinary actions to these two employees.

At some point during the morning of December 19, 2009, Oliveira asked her immediate supervisor, Brian Reynolds, for a personal day off, (PTO), for the following day because she was beginning to feel sick. (She did not request to go home early as she apparently felt well enough to finish her shift). [2] Oliveira testified that she orally made this request in the morning and that Reynolds, at that point, said that this would be fine. Later in the afternoon of December 19, 2009, Caruso wishing to be home with Oliveira on December 20, also handed Reynolds a written request for a personal day for that date.

[2] She also was well enough to go to a union Christmas party held that evening.

There is no dispute that both Oliveira and Caruso had already acquired sufficient leave time in order for each to take a personal day off on December 20, 2009. There is also no dispute that under the terms of the contract, there was no need for either to have a good reason, *or any reason*, for taking this time off.

Nevertheless, the Company's witnesses testified that on December 19, they became aware that a large snow storm was being forecast for December 20. They testified that at some point during the morning, they decided to cancel paid-time off requests for the following day. And in light of the Company's contractual commitment to have a certain number of emergency vehicles available at all times, it would be reasonable to have sufficient vehicles and drivers available in order to adequately respond when road conditions could likely cause delays.

According to the Company's witnesses, they continued to monitor the weather forecasts during that day and throughout the night. The testimony was that the forecast hadn't changed by late evening. The General Counsel did not challenge the Company's assertion that on December 19, the weather forecast was for a big snowstorm on December 20.

There is no dispute that in the afternoon of December 19, Reynolds denied the PTO requests of Caruso and Oliveira, citing the impending snow storm as the reason. According to Caruso, he told Reynolds that just because it was going to snow, this was no reason to deny his request for the day off. [3] He states that Reynolds then suggested that he "just book of with Mike Popyk tonight." According to Caruso, he understood this to mean that he should call Popyk, (Reynold's replacement), after 6 p.m. and tell him that he was taking off because he was sick.

After the 6 a.m. to 6 p.m. shift ended, Reynolds was replaced by Michael Popyk. When Caruso called him at 6:19 p.m., he told Popyk that he would not be coming in on his Saturday shift. According to the credited testimony of Popyk, he told Caruso that the Company had suspended all book-offs because of the storm and that Caruso replied that he was going to take the day off anyway. [4]

Oliveira testified that she spoke to Popyk later in the evening and told him that she was sick and was not coming in for her Saturday shift. She testified that Popyk responded: "Oh great, you're sick" and that he then hung up on her.

On December 20, neither employee showed up for work. Also, despite the weather prediction, the snow storm did not materialize and therefore no emergency actually ensued.

On December 23, 2009 Caruso and Oliveira each received a one day suspension for their unexcused absences on December 20, 2009.

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[3] Oliveira testified that when Reynolds denied the PTO requests he said that Mark Hughson had said that I could not have the day off because we were supposed to have a storm the following day and they were not accepting call outs or book offs. She testified that Reynolds told her to call later in the night and book off with Popyk.

[4] Even assuming that Reynolds told Caruso and Oliveira that they could or should call Popyk after Reynolds left for the day and tell Popyk that they were taking off due to illness, thereby implying that Popyk would OK the requests, that would not be binding on Popyk or the Employer. The evidence shows that by the time that Popyk took over, the Company's decision to suspend PTOs was still in effect and it seems to me that it would be very unlikely that Popyk would take it upon himself to ignore such an order.

The General Counsel suggests that in addition to a general animus against the Union, (evidenced by the findings by the ALJ in the prior case), there is a causal link between the suspensions of Caruso and Oliveira and the fact that the Union filed a tenth unfair labor practice charge two days earlier on December 21, 2009.

I should note that as a general rule, even if not eligible for paid time off, employees have not been disciplined if they call in and can't report to work due to illness or other legitimate reasons. [5] In that respect, AMR's past practice at this location suggests that in the absence of the conversations that took place on December 19, if Oliveira and Caruso had simply called in sick on the morning of December 20, they would not have been suspended. But based on this record, it looks like the Company's supervisors had reason to doubt that either was sick and that both were trying to evade the Company's decision to deny PTOs on December 20.

The Company cites the fact that another employee named William Boucher was also suspended for failing to show up for a scheduled shift on December 25 2009, after having been denied a leave and after asserting that he intended to ignore the Company's decision. On one hand, I note that the Boucher's one day suspension occurred after the suspensions of Caruso and Oliveira. On the other hand, the Company notes that Boucher was an employee who had expressed some antipathy towards the Union.

The factual questions then become (a) was the Company's decision to deny PTOs for December 20 reasonable and consistent with the terms of the contract; (b) whether the two employees' decision to ignore the Company's decision were sufficient to warrant suspensions; (c) whether the suspensions were motivated in whole or in part by anti-union considerations; and (d) whether the Employer would have taken the same action notwithstanding the employees actual or perceived union activities.

(b) The denial of Caruso's vacation request for December 26 and the ensuing suspension

On December 19, 2009, Caruso also requested a one day vacation for the day after Christmas. Although, he clearly had sufficient time available to be eligible to take off on December 26, his request was not made timely under the terms of Article XII Section 2 of the contract. As noted above, that provision requires that; "Full-Time employees shall have an opportunity to request vacation time in single day increments provided such requests are received a minimum of two weeks in advance of the scheduled requested day off." With respect to this, it is clear that Caruso was not making a request for a PTO but was making a request for a vacation day.

On December 21, 2009, Caruso's request was denied. Although the denial is inartfully written, it seems to conflate Caruso's request as one for a PTO *and* a vacation day. To the extent that it treats the request as one for a PTO, the request was denied because the Company claimed that four other employees had been granted paid time off for that day. And to the extent that the request was treated as a request for a vacation day, the denial was based on

[5] For example, on December 20, 2009, three other employees, (St. George, Negrotti and another whose name I can't read), called in to report that for a variety of reasons they would not be coming to work on their scheduled shifts for that date. None of these employees received any discipline. I note however, that all three had later shifts than Caruso and Oliveira and that by the morning, the storm had passed by.

the fact that Caruso's request was not made within the two week time frame required for such requests.

The General Counsel points out that even if Caruso's vacation request was not timely, the Respondent has presented no documentary evidence to support its claim that it had granted the day off to four other employees.

(c) Concluded findings regarding Caruso and Oliveira

The legal test as enunciated in *Wright Line*, 251 NLRB 1083, (1980), enf'd. 622 F.2d 899 (1st Cir., 1980), cert. denied 455 U.S. 988 and as approved in *Transportation Mgt.*, 464 U.S. 393 (1983) is that once the General Counsel makes out a prima facie showing that union or protected concerted activity is a motivating factor in the employer's action against an employee, the burden shift so that the Employer must demonstrate that it would have taken the same action even in the absence of the protected conduct.

Given the conclusions by the Judge in the prior case and given her conclusions regarding credibility, I think it is fair to conclude that the Respondent has exhibited a certain degree of animus towards the Union. I also note in this regard, her conclusion that the Respondent violated Section 8(a)(1) when its agent instructed Caruso to remove a NEMSA pin from his uniform. Additionally, although somewhat ambiguous, I note that the first suspension issued to Caruso and to his fiancé occurred two days after the Union had filed one of its many unfair labor practice charges. In short, I conclude that the General Counsel has made out a prima facie case for the proposition that the Company retaliated against Caruso and Oliveira because of Caruso's union activities.

On the other hand, I conclude that the Respondent has demonstrated, by a preponderance of the evidence, that it would have taken the same disciplinary actions notwithstanding Caruso's union and protected concerted activities.

Although Caruso and Oliveira clearly had a right under the contract to take a personal day off on December 20, 2010 irrespective of their reasons for wanting time off, the contract also gave the Employer the right to "limit the number of employees who may be paid for personal days on any particular shift, as the Employer in its discretion determines it necessary to appropriately staff the shifts."

In my opinion, the imminent anticipation of a large snow storm would be sufficient under the terms of the contract to permit the Employer to suspend PTOs. This is because the Employer has contracted to provide a certain level of services that could easily be impacted by the occurrence of a major snowstorm. And it should be recalled that what we are talking about here is the transportation of sick or injured people to hospital emergency rooms. Thus, I do not think that it was unreasonable, or contrary to the terms of the contract, for the Employer's agents to decide on the afternoon of December 19, 2009 to deny requests for PTOs for December 20. And although the snowstorm did not materialize, the forecasts during the evening of December 19 were still calling for a storm on December 20.

In light of the above, when Popyk reiterated at 6:19 p.m. on December 19, that Caruso could not take off on December 20, Caruso's statement that he was going take off anyway indicates an intention to ignore a direct company order, which order, in this circumstance was reasonable and not discriminatorily motivated. Therefore, when Caruso did not show up for his shift on December 20, this could have reasonably been viewed by the Respondent as an intentional act of defiance and not simply an unexcused absence.

In my opinion, these facts warranted the imposition of a one day suspension issued to Caruso. (Similar in circumstances to the suspension issued to Boucher). As the contract calls for the imposition of a one day suspension for an unexcused absence, it seems to me that the Company was acting in accordance with the contract's terms. As such, I do not conclude that the Respondent's imposition of the one day suspension to Caruso for his failure to report on his December 20 shift was violative of Section 8(a)(1) and (3) of the Act.

As I have concluded that the Company did not violate the Act against Caruso, I also conclude that it did not violate the Act by issuing a one day suspension to his fiancé. Because of the impending storm, her request for time off was also denied. When she called in on the evening of December 19 stating that she was too ill to come to work on December 20, this was met with skepticism. In any event, as her case depends on a finding that the Company illegally discriminated against Caruso, I shall recommend that the allegation involving Oliveira also be dismissed.

As to the vacation issue, the evidence shows that Caruso, on December 19, made a request for a vacation day on December 26. He clearly was eligible for the vacation day, but his request under the terms of the contract was untimely inasmuch as such requests need to be made at least two weeks in advance. Since the Company's denial of his vacation request was in conformity with the terms of the contract, I cannot say that it was so unreasonable as to evidence a discriminatory motive or that the denial is evidence of disparate treatment. I therefore conclude that this allegation should be dismissed.

Finally, as I have concluded that the Company acted in conformity with the relevant contract provisions relating to time off requests, I cannot say that it unilaterally changed the terms and conditions of employment as to this issue. I therefore recommend that this particular 8(a)(1) and (5) allegation be dismissed.

IV. The alleged solicitation to file a decertification petition

About eight months after NEMSA was certified and during the period that contract negotiations were still in progress, the Company sent a letter to its employees at the Waterbury facility. This letter, which originated from Banelli, was dated May 17, 2010. It stated as follows:

> Over the past several days, we have received numerous questions from employees about what is happening at NEMSA, what effect NEMSA's internal issues are having on employees, and what can be done about NEMSA. We understand that employees in many areas may already be taking steps to seek a decertification vote.
>
> The Company cannot take a position on the issue of decertification at this time. We are committed to observing the law in this situation – even if that means that we are not allowed to speak directly with employees on the topic.
>
> Here are the questions we have received and answers based on the information we have at this point.
>
> QUESTION #1: "We have heard that NEMSA has fired multiple Business representatives and stewards in California and the Northeast. Is that true and do you know why?"

ANSWER #1: At last three NEMSA Business Representatives … and multiple other stewards have been fired by NEMSA. The exact reasons for their termination have not been disclosed.

QUESTION #2: "Was a petition to organize filed with the National Labor Relations Board by current Business Representatives and Stewards of NEMSA?"

ANSWER #2: Yes a petition was recently filed with the NLRB by a group seeking an election to unionize as NEMSA workers.

QUESTION #3: "Is true that an unfair labor charge has been filed against NEMSA for unjust terminations of Stewards and Business Representatives?"

ANSWER #3: Yes, based on a letter dated May 4, 2010 … it appears that at least two Unfair labor Practice charges have been filed against NEMSA by a group calling itself the "NEMSA Representatives Employee Association."

QUESTION #4: "With the termination of those Business Representatives and Stewards who will represent us from NEMSA?"

ANSWER #4: As of today, we have been advised that Aaron Pelican and Dary Sardad, NEMSA Business Representatives for Northern California, will now assume responsibility for all areas in the Northeast and Pierce County, Washington (in addition to Northern California).

QUESTION #5: "Is it true that a petition is being circulated to recall the current NEMSA President….?"

ANSWER #5: We have heard rumors that a petition is being circulated, however we are not aware of any specific information relating to this issue.

QUESTION #6: "We are frustrated with NEMSA and now with all this internal turmoil can we just vote them out?"

ANSWER #6: The NLRA includes a procedure to allow employees who are represented by a union to seek a new vote to determine if they want to keep the same representation.

- 30%+ of all unit employees must sign petitions asking for a new vote.
- The employer cannot have anything at all to do with the petitions.
- Once there are petitions with at least 30% signed up, the interested employees can take the documents to the NLRB (or mail them).
- At that point, the NLRB may schedule an election to give employees a choice.
- To remain the bargaining representative, the Union would need to get a majority vote in such an NLRB election. If not, the employees would be non-union.

> QUESTION #7: "How can we find out more about removing the Union and what our options are?"
>
> ANSWER #7: Employees can contact the National Labor Relations Board, the national Right to Work Foundation or the Right to Work Committee. Employees can also access the website www.nlrb.org
>
> QUESTION #8: "Why does the Company have to remain neutral on this issue?"
>
> ANSWER #8: If it appears that management is trying to do anything other than answer basic questions, NEMSA can file an Unfair labor Practice charge and that would impact the rights of t hose who are looking for legitimate answers. It is only when an actual decertification petition is filed with the NLRB that management can legally discuss the company's position with the employees.
>
> Again - you have the legal right to explore your options. Ultimately, such an important decision is up to all of you. Thank you.

Retallick testified that prior to its distribution, there were "some" Waterbury unit employees who questioned various of the topics contained in the memorandum. He also testified:

> [S]ome employees that were coming to me and asking me what they could do to stop affiliating with NEMSA and what was going on with NEMSA at the time and really I couldn't get into any communication with them about it, other than telling them that they could call the NLRB. Then this notice came out from Mr. Banelli hopefully trying to clarify some of the questions.

One problem with Retallick's testimony on this point is that he did not identify who these employees were and did not specify what it was that they actually said to him. (Nor were any of the other foundation questions asked such as when and where these conversations took place or who was present). Secondly, even if true, Retallick's testimony was that "some" employees asked how they could stop the affiliation between MEMSA and WESA. But this was not an issue at the time that this memorandum was issued and whatever affiliation questions may have existed in 2008 and 2009, they were superseded by the fact that NEMSA had replaced WESA after the former had won an NLRB election in September 2009. The affiliation issue was moot and there is no indication in Retallick's testimony that any employees came to him in the period before May 17, 2010 to inquire about the possibility of decertifying NEMSA.

In my opinion the disposition of this issue is mandated by the Board's decisions in *Correction Corp. of America*, 347 NLRB 632, 633 (2006) and *Armored Transport, Inc.,* 339 NLRB 374, 378 (2003).

In *Armored Transport, Inc*., the Board stated:

> The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions. An employer may not provide more than ministerial aid in the preparation or filing of the petition. The decision regarding decertification and the responsibility to prepare and file a decertification petition belongs solely to the employees. "Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no

legitimate role in that activity, either to instigate or to facilitate it." *Harding Glass Co.,* 316 NLRB 985, 991 (1995), and cases cited therein. In this case, by directing employees as to the decertification process by suggesting that they go to the Board to request a new election, and by requesting that they file a decertification petition and present the Respondent with sufficient evidence to withdraw recognition, the Respondent did much more than merely provide information or ministerial assistance to its employees.

In *Correction Corp. of America*, the Board stated:

> We agree with the judge that the Respondent violated Section 8(a)(1) by unlawfully encouraging the employees to seek decertification of the Union. "An employer may not 'initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition.'" *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004) (quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985)). It is not determinative that an employer does not expressly advise employees to get rid of the union. *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003) (citing *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998), enfd. sub nom. *NLRB v. R. T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000)). Indeed, such direct appeals are not essential to establish that an employer solicited decertification. Id. at 378.
>
> The Respondent argues that its statements about decertification were merely in response to employee inquiries on how to decertify the Union. We agree with the judge that the Respondent's position has no merit.
>
> The credited testimony establishes that the Respondent's communications about decertification were not prompted by employee inquiries and that the idea of decertifying the Union was conceived by the Respondent and then proffered to the employees. See, e.g., *Condon Transport, Inc.*, 211 NLRB 297, 302 (1974). There is no credible evidence that any employee ever asked the Respondent how to get rid of the Union. As noted above, the only employee to testify on this issue was de la Fuente. That testimony shows that, in response to his complaints about health benefits, Warden Wagner falsely stated that no other plans were available because the Union had "voted" for the current health care packages. Then, the Respondent distorted de la Fuente's inquiry (as to how to obtain additional health benefits) to suggest to employees that De la Fuente had asked how to decertify the Union. Thus, this is not a case of an employer aiding employees in the "expression of their predetermined objectives." *Poly Ultra Plastics, Inc.*, 231 NLRB 787,790 (1977) (employer's president assisted employees with the petition they were preparing to allow them to revoke their authorization cards). Instead, Wagner's posting was a "transparent attempt to invite pro-company antiunion efforts with implied support." *NorthwestGraphics, Inc.*, 342 NLRB 1288, 1297 (2004). Furthermore, the Respondent's statement implying that it would know who did, and who did not, support the decertification drive added coercive force to its efforts to rid itself of the Union. Under these circumstances, we find that the Respondent violated Section 8(a)(1) by unlawfully encouraging its employees to decertify the Union.

Given the absence of evidence showing that employees sought information from the employer regarding the mechanics of filing a decertification proceeding, it seems to me that the Respondent's May 17 memorandum, which can reasonably be read as encouraging employees

to file a decertification petition, would be unlawful 8(a)(1) conduct under the rationales of the aforementioned Board decisions. [6]

V. The outside employment issue

For many years the Company's employee handbook has contained a policy regarding dual or outside employment. This reads in pertinent part:

> Employees are expected to devote their full attention and effort to their positions with the company. However, you may want to work another job. This is acceptable as long as it does not interfere with your work here or require the use of Company resources, including supplies, phones, people, or information. Keep in mind that if your department needs overtime, you will be asked and expected to work your share.
>
> If full-time non-management employees wish to be employed by another private provider of emergency or non-emergency ground medical transportation service or their affiliated billing entities, (i.e. ground transportation ambulance Company in a market in which the Company operates…), the Employee must notify the Company and obtain prior approval.
>
> All questions regarding any potential conflict of interest pertaining to any of the above should be addressed to your Leader and HR.

The testimony of the Union's witnesses shows that they were aware of this policy because they did seek and obtain permission before getting part-time jobs for work related to Bristol Hospital. Bristol Hospital is in a territory that abuts the territory that the Respondent covers and for many years the Respondent has taken EMS calls to transport people to Bristol Hospital.

The policy described above, does not absolutely prohibit the Respondent's employees from working for competing ambulance companies and during a stretch of years, at least four of the Respondent's EMTs have been employed either by Bristol Hospital or an ambulance company that serviced the territory of that hospital.

On May 12, 2010, Bristol Hospital Emergency Medical Services, LLC sent a letter to the Respondent which in essence, complained that the Respondent was transporting people to and from the hospital within that hospital's territorial jurisdiction. In substance, Bristol Hospital was telling AMR to stay out of its territory.

In the meantime, the Union and the Company were involved in contract negotiations. And commencing on July 21, 2010, both sides made proposals and counter proposals regarding the issue of outside employment. In substance, the Company proposed a strict limitation on outside employment for all full-time employees, requiring written approval and allowing the

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[6] In my opinion the Respondent's reliance on *R.L. White,* 262 NLRB 575, 576 (1982) and *Perkins Machine Co.,* 141 NLRB 697, 698 (1963) is inapposite. Neither of those cases deal with situations where an employer was involved in urging or soliciting employees to file decertification petitions. Instead, they involved situations where company managers or supervisors told employees about their rights to revoke authorization cards or their contractual rights to withdraw from union membership and revoke their dues check-off authorizations.

company to revoke any approval which actions would not be subject to the grievance procedure of the contract. The Union's position throughout negotiations was to reject the Employer's proposal on this issue. The Union, although acknowledging that full-times employee would have to give precedence to their employment with the Respondent, made a proposal that would be less restrictive in the ability of employees to work for other employers, including employers that might be competitors of the Respondent.

On October 19, 2010, the parties made a tentative agreement on this issue. This was as follows:

> Section 25.01 – Outside Employment
> The Employer shall be considered by all full-time employees covered by this Agreement as their employer of first choice. Work requirements of the Employer will have precedence over any outside employment. Employees who are unable to maintain a high standard of work performance or are unable to report to duty as required by the employer as a result of outside employment are subject to appropriate corrective action.
>
> The Employer will not pay any benefits for injuries or illness resulting from outside employment except as provided for by the employee's medical insurance, PTO accruals, or required by applicable law.

Notwithstanding the tentative agreement on this issue made on October 19, 2010, the Company, apparently in response to the attempt by Bristol Hospital to exclude AMR from its territory, issued on November 17, 2010, a notice to AMR's employees prohibiting them from working at Bristol. This read:

> Section 3.8 of the Employee Handbook provides that AMR employees may not be employed by another private provider of emergency or non-emergency ground medical transportation services without the company's approval.
>
> As Bristol Hospital EMS … is a direct competitor of American Medical Response, it has been determined that employee with Bristol in any capacity while working for AMR creates an unacceptable conflict of interest and will not be approved.
>
> If you are currently employed with both AMR and Bristol, please contact myself or Tony Cardenales in Human Resources no later than November 30, 2010 in order to disclose that information. At that time you will need to inform us of your decision to resign your employment with either AMR or Bristol.
>
> As of December 14, 2010, any Paramedic, EMT and Transportation AMR employee who has failed to made the appropriate disclosure to AMR and who is found to still be working for Bristol in any capacity will be subject to termination of employment from AMR immediately.

The Company's witness, (Retallick), testified that shortly before issuing the November 17 notice, which clearly goes well beyond what was agreed to by the parties in the tentative agreement made a month earlier, he had a conversation in his office with the Union's new business agent and that after showing him the proposed notice was told that it seemed OK. This business agent was not a participant in the contract negotiations and was essentially a newcomer to this area. It is inconceivable that he had the authority, or could reasonably have been viewed as having the authority, to overturn what the parties had agreed to during the

lengthy negotiations where substantial discussion and disagreement were expressed and ultimately resolved over this very issue. Any contention that this alleged conversation should be construed as a waiver is rejected.

It is clear to me that the November 17 notice constituted not only a material unilateral change from the past practice whereby the Company typically permitted employees to work at other competing employers, but also represented a breach of the agreement that the Union and the Company had earlier made on this very subject. I therefore conclude that in this respect the Employer violated Section 8(a)(1) and (5) of the Act. *Quality Health Services of P.R., INC. d/b/a Hospital San Cristobal,* 356 NLRB No. 95 (2011).

Conclusions of Law

(1) By soliciting the filing of a decertification petition, the Respondent has violated Section 8(a) (1) of the Act.

(2) By unilaterally changing its policies regarding outside employment, the Respondent has violated Section 8(a) (1) and (5) of the Act.

(3) The Respondent has not violated the Act in other manner encompassed by the Complaint.

(4) The aforesaid violations affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the evidence indicates that some employees terminated their employment with other employers as a result of the Respondent's November 17, 2010 policy change, it is recommended that those employees be made whole for any loss of earnings as a result of the Respondent's unilateral action. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, American Medical Response of Connecticut Inc., its officers, agents, successor, and assigns, shall

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and Desist from

(a) Soliciting employees to file of a decertification petition.

(b) Unilaterally changing its policies regarding outside employment.

(c) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and abide by the terms of the agreement setting forth the policy regarding dual or outside employment.

(b) Make whole, with interest, any employees, who as a result of the November 17, 2010 policy change, lost their outside employment.

(c) Within 14 days after service by the Region, post at its Waterbury Connecticut facility, copies of the attached notice marked "Appendix" [8] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., May 23, 2011

Raymond P. Green
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employees to file of a decertification petition.

WE WILL NOT unilaterally change our policies regarding outside employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL restore and abide by the terms of our agreement with NEMSA setting forth the policy regarding dual or outside employment.

WE WILL make whole, with interest, any employees who lost their outside employment as a result of the November 17, 2010 policy change.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

280 Trumbull Street, 21st Floor
Hartford, Connecticut 06103-3503
Hours: 8:30 a.m. to 5 p.m.
860-240-3522.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.